

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

CHAPTER 23

DRINKING WATER STATE REVOLVING FUND ACT

Sub-Chapter 1

Financial Assistance

- Rule 36.23.101 Purpose
- 36.23.102 Definitions
- 36.23.103 Construction of Rules
- 36.23.104 Use of the Revolving Fund
- 36.23.105 Eligibility for General Loan and Assistance Programs
- 36.23.106 Application
- 36.23.107 Evaluation of Projects and Applications
- 36.23.108 Proof of Financial, Managerial or Technical Capability
- 36.23.109 Financial and Other Requirements for Loans to Municipalities
- 36.23.110 General Obligation Bonds
- 36.23.111 Revenue Bonds
- 36.23.112 Special Improvement Districts
- 36.23.113 Loans to Disadvantaged Municipalities
- 36.23.114 Other Types of Bonds or Additional Security or Covenants for Municipalities
- 36.23.115 Financial and Other Requirements for Loans to Private Persons
- 36.23.116 Covenants Regarding Facilities Financed by Loans
- 36.23.117 Fees
- 36.23.118 Evaluation of Financial Matters and Commitment Agreement

36.23.119 Requirements for Disbursin g of Loan

36.23.120 Terms of Loan and Bonds

## Sub-Chapter 1

### Financial Assistance

36.23.101 PURPOSE (1) The purpose of this chapter is to implement the provisions of the Drinking Water State Revolving Fund Act pursuant to Title 75, chapter 6, part 2, MCA; and the Federal Safe Drinking Water Act, 42 USC 300f to 42 USC 300j-26, inclusive, as amended to January 1, 1997.

(2) The act establishes a program under which the state may provide financial assistance to community water systems and nonprofit noncommunity water systems.

(3) The act delegates implementation of certain financial provisions to the department and certain technical provisions to the department of environmental quality.

(4) The act authorizes the department and the department of environmental quality to adopt rules within their respective authorities.

(5) The board of environmental review has adopted rules to assure that the state's regulations pertaining to public water supplies complies with the Federal Safe Drinking Water Act. ARM 17.38.101 et seq. and 17.38.201 et seq.

(6) The department of environmental quality may adopt rules or amend existing rules to implement the program.

(7) The act authorizes the use of the revolving fund to make loans to community water systems and nonprofit community water systems and to provide financial and technical assistance to any public water system as part of a capacity development strategy.

(8) The department proposes rules to implement the making of loans to community water systems and nonprofit noncommunity water systems from the revolving fund. The act further authorizes the revolving fund to be used to purchase insurance for or to guarantee obligations issued by municipalities. The department reserves the right to adopt rules to implement a guarantee and insurance component of the program if it determines it is necessary or desirable. (History: 75-6-205 and 75-6-232, MCA; IMP, 75-6-221, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.102 DEFINITIONS In this chapter, the following terms have the meanings indicated below and are supplemental to the definitions contained in Title 75, chapter 6, parts 1 and 2, MCA; sections 300f through 300j-26 of the Federal Safe Drinking Water Act, 42 USC, as amended, and ARM 17.38.101 et seq. and 17.38.201 et seq. Terms used but not defined herein have the meanings prescribed in ARM 17.38.101 et seq. and 17.38.201 et seq. or the

indenture of trust. (Definitions (2), (16), (19), (23), (28), (29), (30), (33), (35), (36), (40), (41), (42), (43) and (47) are statutory definitions.)

(1) "Act" means Drinking Water State Revolving Fund Act, Title 75, chapter 6, part 2, MCA.

(2) "Administrative costs" means costs incurred by the department and the department of environmental quality in the administration of the program, including but not limited to:

- (a) costs of servicing loans and issuing debt;
- (b) program startup costs;
- (c) financial, management, and legal consulting fees; and
- (d) reimbursement costs for support services from other state agencies.

(3) "Administrative expense surcharge" means a surcharge on each loan charged by the department to the borrower expressed as a percentage per annum on the outstanding principal amount of the loan, payable by the borrower on the same dates that payments of principal and interest on the loan are due, calculated in accordance with these rules.

(4) "Administrative fee" means the fee expressed as a percentage of the initial committed amount of the loan retained by the department from the proceeds of the loan at closing, calculated in accordance with these rules.

(5) "Application" means the form of application provided by the department and the department of environmental quality which must be completed and submitted in order to request a loan.

(6) "Binding commitment" means an executed commitment agreement.

(7) "Bond" means an obligation issued by a municipality pursuant to the provisions of Montana law and the code.

(8) "Bond anticipation note" means a note issued by a municipality under the provisions of 7-7-109, MCA, in anticipation of the issuance of long-term indebtedness for a project.

(9) "Borrower resolution" means a resolution of a municipality authorizing the issuance of bonds and establishing the terms and conditions and providing security therefore.

(10) "Borrower" means an entity to whom a loan is made.

(11) "Borrower obligation" means a bond or a loan agreement.

(12) "Closing" means, with respect to a loan, the date of delivery of the borrower resolution and the borrower obligation to the department.

(13) "Code" means the Internal Revenue Code of 1986, as amended.

(14) "Commitment agreement" means a written agreement between the borrower and the department pursuant to which the department agrees to make a loan to the borrower in a specified principal amount on or before the date and subject to the terms and conditions specified in the agreement.

(15) "Community water system" means a public water system that is owned by a private person or a municipality and that serves at least 15 service connections used by year-round residents of the area served by the system or regularly serves at least 25 year-round residents. The term does not include a public water system that is owned by the federal government.

(16) "Cost" means, with reference to a project, all capital costs incurred or to be incurred for a public water system, including but not limited to:

- (a) engineering, financing, and other fees;
- (b) interest during construction;
- (c) construction; and
- (d) a reasonable allowance for contingencies to the extent permitted by the federal act and rules promulgated under the federal act.

(17) "Debt" means debt incurred to acquire, construct, extend, improve, add to, or otherwise pay expenses related to the system, without regard to the source of payment and security for such debt.

(18) "Department" means the Montana department of natural resources and conservation.

(19) "Department of environmental quality" means the Montana department of environmental quality.

(20) "Disadvantaged municipality" means one in which the service area of a public water system meets the affordability criteria established in these rules.

(21) "EPA" means the United States environmental protection agency.

(22) "EPA agreement" means the operating agreement between the state and the EPA.

(23) "Federal act" means the Federal Safe Drinking Water Act, 42 USC sections 300f through 300j-26, as that act read on May 5, 1997.

(24) "General obligation" means an obligation of a municipality pledging the full faith and credit of and unlimited taxing power of the municipality.

(25) "Governing body" means the duly elected or appointed board, council, or commission or other body authorized by law to govern the affairs of the municipality.

(26) "Gross revenues" means with respect to revenue bonds, all revenues derived from the operation of the system, including but not limited to rates, fees, charges, and rentals imposed for connections with and for the availability, benefit, and use of the system as now constituted and of all replacements and improvements thereof and additions thereto, and from penalties and interest thereon, and from any sales of property acquired for the system and all income received from the investment of all moneys on deposit in system accounts.

(27) "Indenture of trust" means the indenture of trust between the board of examiners and a trustee establishing and implementing the program, establishing certain terms and conditions for the sale and issuance of the state's bonds to fund the program,

providing for the application of the proceeds of the state's bonds and the repayments of the state's bonds and establishing the funds and accounts for the program.

(28) "Indian tribe" means an Indian tribe that has a federally recognized governing body carrying out substantial governmental duties and powers over any area.

(29) "Intended use plan" means the annual plan adopted by the department of environmental quality and submitted to the EPA that describes how the state intends to use the money in the revolving fund.

(30) "Loan" means a loan of money from the revolving fund for project costs.

(31) "Loan agreement" means an agreement entered into between a borrower other than a municipality and the department evidencing a loan.

(32) "Loan loss reserve surcharge" means a surcharge expressed as percentage per annum on the outstanding principal amount of the loan at the rate determined in these rules and imposed on all borrowers unless waived in accordance with the provisions of these rules.

(33) "Municipality" means a state agency, city, town, or other public body created pursuant to state law or an Indian tribe.

(34) "Net revenues" means the entire amount of gross revenues of the system less the actual operation and maintenance cost plus additional annual costs of operation and maintenance estimated to be incurred, including sums to be deposited in an operating reserve.

(35) "Noncommunity water system" means a public water system that is not a community water system.

(36) "Nonprofit noncommunity water system" means a noncommunity water system owned by an organization that is organized under Montana law and that qualifies as a tax-exempt organization under the provisions of section 501(c)(3) of the Internal Revenue Code.

(37) "Origination fee" means the fee imposed on borrowers to pay a proportionate share of costs of issuing the state's bonds to fund the program, as adjusted from time to time as may be required by the department.

(38) "Outstanding indebtedness bond" means with respect to a municipality any bonds currently outstanding payable from gross or net system revenues and with respect to a private person, any loan payable in whole or in part from the same source as a proposed loan.

(39) "Priority list" means the list of projects expected to receive financial assistance under the program, ranked in accordance with a priority system developed under Section 216 of the act.

(40) "Private person" means an individual, corporation, partnership, or other nongovernmental legal entity.

(41) "Program" means the drinking water state revolving fund program established by Title 75, chapter 6, part 2, MCA.

(42) "Project" means improvements or activities that are:

(a) to be undertaken for a public water system and that are of a type that will facilitate compliance with the national primary drinking water regulations applicable to the system; or

(b) to further the health protection objectives of the federal act.

(43) "Public water system" means a system for the provision to the public of water for human consumption, through pipes or other constructed conveyances, if that system has at least 15 service connections or regularly serves at least 25 individuals. The term includes any collection, treatment, storage, and distribution facilities under control of an operator of a system that are used primarily in connection with a system and any collection or pretreatment storage facilities not under control of an operator and that are used primarily in connection with a system.

(44) "Reserve requirement" means the amount required to be maintained in a reserve fund securing the payment of a bond as set forth in the commitment agreement which amount shall be the lesser of:

(a) 10% of the principal amount of the bond; or

(b) maximum annual debt service on the bond in the then current or any future fiscal year.

(45) "Revenue" means revenues (gross or net) received by the municipality from or in connection with the operation of the system.

(46) "Revenue bonds" means bonds payable from the net revenues derived from the system.

(47) "Revolving fund" means the drinking water state revolving fund established by 75-6-211, MCA.

(48) "Security agreements" means agreements entered into by borrowers to provide additional security for loans, including letters of credit and mortgage, personal or corporate guarantee pledge agreements.

36.23.103 CONSTRUCTION OF RULES (1) Any conflict between this subchapter and the indenture of trust shall be resolved in favor of the indenture of trust. (History: 75-6-205, MCA; IMP, 75-6-205, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.104 USE OF THE REVOLVING FUND (1) The program must be administered in accordance with the act and the federal act and these rules. To the extent of any conflict therein, the act and federal act take precedence over the rules.

(2) Money in the revolving fund may be used, subject to limitations and compliance in any fiscal year with the intended use plan, to:

(a) make loans to community water systems and nonprofit noncommunity water systems as provided in these rules;

(b) buy or refinance the debt obligation of a municipality at an interest rate that does not exceed market rates, provided that the obligations were incurred and construction of the project began

after July 1, 1993;

(c) leverage the total amount of revolving funds available by providing a source of revenue or security for the payment of principal and interest on revenue or general obligation bonds issued by the state, the net proceeds of which are deposited in the revolving fund;

(d) pay reasonable administrative costs of the program, not to exceed 4% of the annual capitalization grant or the maximum amount allowed under the federal act;

(e) if matched by an equal amount of state funds, pay the department's costs in an amount not to exceed 10% of the annual capitalization grant for the following:

(i) public water system supervision programs;

(ii) administering or providing technical assistance through source water protection programs;

(iii) developing and implementing a capacity development strategy under section 300g -9 of the federal act; and

(iv) administering an operator certification program in order to meet the requirements of section 300g -8 of the federal act;

(f) pay the costs in an amount not to exceed 2% of the annual capitalization grant for the purpose of providing technical assistance to public water systems serving 10,000 or fewer persons.

No less than 1.5% of the annual capitalization grant must be contracted by the department to private organizations or individuals for the purposes of this subsection; and

(g) reimburse the expenses, as provided for in 2 -18-501 through 2 -18-503 and 5-2-302, MCA, of the advisory committee while on official committee business.

(3) Except as provided in (4), money in the fund may not be used for:

(a) expenditures related to monitoring, operation, and maintenance;

(b) the acquisition of real property or any interest in real property, unless the acquisition is integral to a project authorized under this rule and the purchase is from a willing seller;

(c) providing assistance to a public water system that:

(i) does not have the financial, managerial, and technical capability as determined by the department and the department of environmental quality to ensure compliance with the requirements of the federal act; or

(ii) is in significant noncompliance with any requirement of a national primary drinking water regulation or variance; or

(d) any other activity prohibited from funding under the federal act.

(4) A public water system described in (3)(c) may receive assistance under this part if:

(a) the use of the assistance will ensure compliance; and

(b) for a system that the department has determined does not have the financial, managerial, or technical capability to ensure compliance with the federal act, the owner or operator of the

system agrees to undertake feasible and appropriate changes in operations, including ownership, management, accounting, rates, maintenance, consolidation, alternative water supply, or other procedures, as determined necessary by the department and the department of environmental quality to ensure compliance.

(5) Prior to providing assistance to a public water system that is in significant noncompliance with any requirement of a national primary drinking water regulation or variance pursuant to the federal act, the department shall determine whether the provisions of (3)(c)(i) apply to the system. [With the exception of (1), this rule repeats statutory language.] (History: 75-6-205, MCA; IMP, 75-6-212, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

#### 36.23.105 ELIGIBILITY FOR GENERAL LOAN AND ASSISTANCE PROGRAMS

(1) The department will make loans only to community water systems and nonprofit noncommunity water systems for eligible projects included in the intended use plan according to priorities established therein and adopted in compliance with 75-6-231, MCA, and department of environmental quality rules regarding the intended use plan and only for projects that qualify under the act and the federal act. (History: 75-6-205, MCA; IMP, 75-6-221, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.106 APPLICATION (1) The department shall, after consultation with the department of environmental quality, establish loan application procedures, including forms for the applications. Each application for a loan must include:

- (a) a reasonably detailed description of the project;
- (b) a reasonably de tailed estimate of the cost of the project;
- (c) a timetable for the construction of the project and for payment of the cost of the project;
- (d) identification of the source or sources of funds to be used in addition to the proceeds of the loan to pay the cost of the project;
- (e) the source or sources of revenue proposed to be used to repay the loan;
- (f) a current financial statement of the system showing assets, liabilities, revenues, and expenses;
- (g) a statement as to whether, at the time of application, there are any outstanding loans, notes, bonds or other obligations payable from the revenue of the public water system and, if so, a description of the loans, notes, bonds or other obligations;
- (h) if the applicant is a private person, a statement as to whether, at the time of the application, there are any outstanding loans, notes, or other obligations of the private person and, if so, a description of the loans, notes, or other obligations;
- (i) any information that the department may require in order to determine the effect of making the loan on the tax exempt status of the state's bonds; and
- (j) any other information that the department or the



department of environmental quality may require to determine the feasibility of a project and the applicant's ability to repay the loan, including but not limited to:

- (i) engineering reports;
- (ii) economic feasibility studies; and
- (iii) legal opinions.
- (2) Each application for a loan subsidy must include:
  - (a) a reasonably detailed description of the project;
  - (b) a reasonably detailed estimate of the cost of the project;
  - (c) a timetable for the construction of the project and for payment of the cost of the project;
  - (d) identification of the source or sources of funds to be used in addition to the proceeds of the grant to pay the cost of the project;
  - (e) a statement as to whether, at the time of application, there are any outstanding loans, notes, bonds or other obligations payable from the revenue of the public water system and, if so, a description of the loans, notes, bonds or other obligations;
  - (f) an explanation, including supporting information, as to why a subsidy is requested;
  - (g) evidence that the applicant qualifies as a disadvantaged municipality; and
  - (h) any other information that the department or the department of environmental quality may require. [With the exception of the phrase "after consultation with the department of environmental quality," this rule repeats statutory language.] (History: 75-6-205, MCA; IMP, 75-6-223, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.107 EVALUATION OF PROJECTS AND APPLICATIONS (1) The department and the department of environmental quality shall evaluate projects and loan applications. In evaluating projects and applications, the following factors must be considered:

- (a) the technical design of the project to ensure compliance with all applicable statutes, rules, and design standards;
- (b) the financial capability of the applicant;
- (c) the financial, managerial, and technical ability of the applicant to properly operate and maintain the project;
- (d) the total financing of the project to ensure completion;
- (e) the viability of the public water system;
- (f) the ability of the public water system to pay the costs of the project without the requested financial assistance;
- (g) the total amount of loan funds available for financial assistance in the revolving fund;
- (h) the total amount requested by other applications that have been received or that are likely to be received;
- (i) the ranking of the project on the priority list in the intended use plan; and
- (j) any other criteria that the department determines to be appropriate, considering the purposes of the program and the

federal act. (History: 75-6-205, MCA; IMP, 75-6-224, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.108 PROOF OF FINANCIAL, MANAGERIAL OR TECHNICAL CAPABILITY

(1) The program may not provide assistance to a public water system that does not have financial, managerial and technical capability to assume compliance with the requirements of the federal act, except as provided herein. For purposes of these rules those terms shall have the following meanings:

(a) "Financial capability" shall mean the financial resources of the water system, including but not limited to the revenue sufficiency, credit worthiness, and fiscal controls.

(b) "Managerial capability" shall mean the management structure of the water system, including but not limited to ownership accountability, staffing and organization.

(c) "Technical capability" shall mean the physical infrastructure of the water system, including but not limited to the source water adequacy, infrastructure adequacy, and technical knowledge based on information provided by the borrower and its own inquiry of system operators.

(2) Each applicant for financial assistance under the program shall complete a capability assessment questionnaire provided by the department of environmental quality, which will elicit from the borrower relevant information that will enable the department and the department of environmental quality to determine the borrower's capabilities. In determining whether the borrower has the relevant capability, the department and department of environmental quality shall consider, among other things:

(a) financial capability:

(i) whether the revenues cover the costs of the system;

(ii) whether the rates and charges cover the costs by providing water service;

(iii) whether adequate books and records are maintained; and

(iv) whether appropriate budgeting, accounting and financial planning methods are used.

(b) managerial capability:

(i) whether the system owner(s), operator(s) and manager(s) are clearly identified;

(ii) whether system owner(s) can be held accountable for the system;

(iii) whether the system is properly staffed and organized;

(iv) whether personnel understand the management aspects of regulatory requirements and system operations;

(v) whether personnel have adequate expertise to manage water system operations;

(vi) whether personnel have the necessary licenses and certifications;

(vii) whether the system interacts well with customers, regulators, and other entities; and

(viii) whether the system is aware of available external resources, such as technical and financial assistance.

- (c) technical capability:
  - (i) whether the system has a certified operator;
  - (ii) whether the system is operated with technical knowledge of applicable standards;
  - (iii) whether personnel are able to implement technical knowledge effectively;
  - (iv) whether the operators understand the technical and operational characteristics of the system; and
  - (v) whether the system has an effective operation and maintenance program. (History: 75-6-205, MCA; IMP, 75-6-222, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.109 FINANCIAL AND OTHER REQUIREMENTS FOR LOANS TO MUNICIPALITIES (1) If a municipality is determined to have financial, technical, and managerial capabilities consistent with these rules and rules adopted by the department of environmental quality, the following types of bonds will be accepted by the department as evidence of and security for a loan under the program if Montana law authorizes the municipality to issue such bonds to finance the project and the department determines the municipality has the ability to repay the loan. Notwithstanding compliance with the provisions of state law, the department may determine that it will not approve the loan if it determines that the loan is not likely to be repaid in accordance with its terms or in the alternative it may impose additional security requirements that in its judgment it considers necessary. (History: 75-6-205, MCA; IMP, 75-6-222, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.110 GENERAL OBLIGATION BONDS (1) The department may accept general obligation bonds issued by a municipality, upon the following terms:

- (a) the bond will not cause the municipality to exceed its statutory indebtedness limitation;
- (b) all statutory requirements for the issuance of such bonds shall have been met prior to the issuance of the bonds; and
- (c) the election authorizing the issuance of the bonds has been conducted by the date of a binding commitment unless such requirement is waived by the department.

(2) The department may accept general obligation bonds issued by county water and sewer districts upon the following terms:

- (a) all statutory requirements for the issuance of such bonds shall have been met prior to the issuance of the bonds;
- (b) the election authorizing the issuance of the bonds has been conducted by the date of a binding commitment unless such requirement is waived by the department. (History: 75-6-205, MCA; IMP, 75-6-222, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.111 REVENUE BONDS (1) The department may accept revenue bonds issued by a municipality in accordance with the provisions of Title 7, chapter 7, part 44, or Title 7, chapter 13, part 2, MCA, or other applicable statutory provisions, subject to

the following terms and conditions:

(a) the bonds must be payable from the revenues of the system on a parity with any outstanding revenue bonds payable from the system. The bond must be secured by a pledge of the net revenues of the system. If bonds are currently outstanding payable from the gross revenues of the system, a gross revenue pledge will be acceptable provided the requirements of (1)(b) through (d) are met;

(b) the payment of principal and interest on the revenue bonds must be secured by a reserve account equal to reserve requirement, such requirement to be met upon the issuance of the bonds;

(c) the municipality shall covenant to collect and maintain rates, charges, and rentals such that the revenue for each fiscal year the bonds are outstanding will be at least sufficient to pay the current expenses of operation and maintenance of the system, to maintain the operating reserve, and to produce net revenues during each fiscal year not less than 125% of the maximum amount of principal and interest due on all outstanding bonds payable from the revenues of the system in any future fiscal year;

(d) the municipality shall agree not to incur any additional debt payable from the revenues of the system, unless the net revenues of the system for the last complete fiscal year preceding the issuance of such additional bonds have equaled at least 125% of the maximum amount of principal and interest payable from the revenue bond account in any subsequent fiscal year during the term of the then outstanding bonds and the additional bonds proposed to be issued. For the purpose of the foregoing computation, the net revenues must be those shown by the financial reports caused to be prepared by the municipality, except that if the rates and charges for service provided by the system have been changed since the beginning of the preceding fiscal year, then the rates and charges in effect at the time of issuance of the additional bonds must be applied to the quantities of service actually rendered and made available during such preceding fiscal year to ascertain the gross revenues, from which there shall be deducted, to determine the net revenues, the actual operation and maintenance cost plus any additional annual costs of operation and maintenance which the engineer for the municipality estimates will be incurred because of the improvement or extension of the system to be constructed from the proceeds of the additional bonds proposed to be issued. In no event may any such additional bonds be issued and made payable from the revenue bond account if there then exists any deficiency in the balances required to be maintained in any of the accounts of the fund or if the municipality is in default in any of the other provisions;

(e) applications indicating the loan will be evidenced by the issuance of a revenue bond must be accompanied by:

(i) audited financial statements of the system for the last two completed fiscal years;

(ii) a certificate as to the municipality's current population and number of system users, a schedule of the 10 largest users of

the system showing the percentage of total revenues provided by such user and the amount of outstanding system debt;

(iii) a description of the existing and proposed facilities constituting the system, including a discussion of the additional capital needs for the system over the next three-year period;

(iv) a copy of the ordinance or resolution establishing and describing the system of rates and charges for the use or availability of the system;

(v) a pro forma showing revenues of the system in an amount sufficient to meet the requirements of these rules and any outstanding obligations payable from the system;

(vi) if the pro forma indicates an increase in rates and charges to meet the requirements of these rules, a copy of the proposed rates and charge resolution and a proposed schedule for the adoption of the charges and if subject to review or approval by another entity, the schedule for the rate approval; and

(vii) any other information deemed necessary by the department to assess the feasibility of the project and the financial security of the bonds;

(A) notwithstanding the fact that the municipal revenue bond act does not require that the issuance of revenue bonds be approved by the voters, the department may require the municipality to conduct an election to evidence community support and acceptance of the project or require the bonds be authorized by the electors and issued as general obligation bonds in accordance with 7-7-4202, MCA. A municipality shall conduct an election to evidence community support and acceptance of the project when in the opinion of the department there are projected large rate increases due to the improved facility or the facility is a projected high-cost facility.

(2) Tax-backed revenue bonds issued by county water and sewer districts created pursuant to Title 7, chapter 13, parts 22 and 23, MCA, will be accepted as evidence of the loan, subject to the following terms and conditions:

(a) the issuance of the bonds must be authorized by the electors of the district as provided in 7-13-2321 through 7-13-2328, MCA;

(b) the election authorizing the incurrence of the debt shall be conducted by the date of the binding commitment, unless such requirement is waived by the department;

(c) the district shall covenant that it will cause taxes to be levied to meet the district's obligation on any bond issued to the department in the event that the revenues of the system are inadequate therefore in accordance with the provisions of 7-13-2302 through 7-13-2310, MCA;

(d) the bonds must be payable from the revenues of the system on a parity with any outstanding revenue bonds payable from the system;

(e) the district shall covenant to collect and maintain rates, charges, and rentals such that the revenue for each fiscal year the bonds are outstanding will be at least sufficient to pay the current expenses of operation and maintenance of the system, to maintain the operating reserve and to produce net revenues during each fiscal year not less than 110% of the maximum amount of principal and interest due on all outstanding bonds payable from the revenues of the system in any future fiscal year;

(f) the payment of principal and interest on the bonds must be secured by a reserve account equal to the reserve requirement, such requirement to be proportionately funded from each periodic draw so that the requirement is fully satisfied upon the final draw;

(g) the district shall agree not to incur any additional debt payable from the revenues of the system without the written consent of the department, unless the net revenues of the system for the last complete fiscal year preceding the issuance of such additional bonds have equaled at least 110% of the maximum amount of principal and interest payable from the revenue bond account in any subsequent fiscal year during the term of the then outstanding bonds and the additional bonds proposed to be issued. For the purpose of the foregoing computation, the net revenues must be those shown by the financial reports caused to be prepared by the district, except that if the rates and charges for services provided by the system have been changed since the beginning of the preceding fiscal year, then the rates and charges in effect at the time of issuance of the additional bonds must be applied to the quantities of service actually rendered and made available during such preceding fiscal year to ascertain the gross revenues, from which there shall be deducted, to determine the net revenues, the actual operation and maintenance cost plus any additional annual costs of operation and maintenance which the engineer for the district estimates will be incurred because of the improvement or extension of the system to be constructed from the proceeds of the additional bonds proposed to be issued. In no event shall any such additional bonds be issued and made payable from the revenue bond account if there then exists any deficiency in the balances required to be maintained in any of the accounts of the fund or if the district is in default in any of the other provisions;

(h) an application by a district must be accompanied by:

(i) financial statements of the system for the last two completed fiscal years if there is an existing system (the department in its discretion may require that at least one year's financial statement be audited);

(ii) a map depicting the boundaries of the district;

(iii) a certificate as to numbers of persons in the district subject to levy described in (v) and the number of wastewater system customers and the amount of outstanding wastewater debt;

(iv) a pro forma showing revenues of the system in an amount sufficient to meet the requirements of these rules and any outstanding obligations payable from the system;

(v) if the pro forma indicates an increase in rates and charges to meet the requirements of these rules, a copy of the proposed rates and charge resolution and a proposed schedule for the adoption of the charges. (History: 75-6-205, MCA; IMP, 75-6-222, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.112 SPECIAL IMPROVEMENT DISTRICTS (1) The department may accept as evidence of the loan, bonds issued by a municipality payable from assessments levied upon real property included within a special improvement district and specially benefitted by the project being financed from the proceeds of the loan, upon the following terms and conditions:

(a) the district be created in accordance with the provisions of Title 7, chapter 12, part 21 and/or Title 7, chapter 12, parts 41 and 42, MCA;

(b) the city or county agrees to maintain a revolving fund as authorized by 7-12-2181 through 7-12-2186 and 7-12-4221 through 7-12-4225, MCA, (respectively, the revolving fund statutes) and covenants to secure the bonds by such revolving fund and agrees to provide funds for the revolving fund by levying such tax or making such loan from the general fund as authorized by the revolving fund statutes;

(c) five percent of the principal amount of the loan be deposited into the revolving fund and the city or county shall agree to maintain in the revolving fund to the extent allowed by law, an amount not less than 5% of the principal of the bonds secured by the revolving fund. The department may, if the financial risks associated with a proposed district warrant it, as a condition to the purchase of such bond, require the city or county to establish a district reserve fund and fund it from the proceeds of the loan, as permitted by law;

(d) the special improvement district be at least 75% developed. For purposes of this rule, a district will be deemed to be 75% developed if 75% of the lots or assessable area in the district has a habitable residential dwelling thereon that is currently occupied or there is a commercial, professional, manufacturing, industrial, or other non-residential facility thereon;

(e) the total amount of special assessment debt including the amounts to be assessed for repayment of the loan against the lots or parcels of land in the district does not exceed 50% of the fair market value of such lots or parcels within the district; and

(f) if the project to be financed from the loan secured by a special assessment bond is not part of a system currently existing and operated by the municipality receiving the loan and for the normal maintenance and operation of which the municipality is responsible and provides for such through rates and charges, a special maintenance district must be created at the time the improvement district is created pursuant to the applicable statutes in order to provide for the operation and maintenance of the project or an agreement must have been entered into at the time the

loan is made between the municipality and another governmental entity, pursuant to which the governmental entity agrees to operate and maintain the project. (History: 75-6-205, MCA; IMP, 75-6-222, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.113 LOANS TO DISADVANTAGED MUNICIPALITIES (1) The department may provide additional subsidies to disadvantaged municipalities in the form of interest rates below that set for other borrowers under the program. A municipality is considered economically disadvantaged when its combined monthly water and wastewater system rates are greater than or equal to 2.2% of the municipality's median household income (MHI), as defined by United States bureau of census. If the municipality has only a water system, the percentage is 1.4% of the municipality's MHI. If a municipality is determined to be a disadvantaged municipality, the department will waive the loan loss surcharge which will result in a lower annual rate on interest on the loan. The amount of subsidies available to disadvantaged municipalities is set annually in the intended use plan. The awarding of subsidies to disadvantaged municipalities will be allocated on a first come, first served basis. The value of subsidies provided for disadvantaged municipalities during a federal fiscal year may not exceed 20% of the annual capitalization grant for that year.

(2) The department may allow a disadvantaged municipality to repay its loan over a term not to exceed 30 years, rather than 20 years, provided that the term of the loan does not exceed the expected design life of the project being financed. (History: 75-6-205, MCA; IMP, 75-6-224, 75-6-226, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.114 OTHER TYPES OF BONDS OR ADDITIONAL SECURITY OR COVENANTS FOR MUNICIPALITIES (1) If a municipality wishes to secure a loan by a type of bond not specifically authorized in these rules, the department may accept the bond if the bond is duly authorized and issued in accordance with Montana law as evidenced by an opinion of bond counsel to that effect and the department determines that the terms and conditions of the bond, including the security therefore, are adequate. The department may impose upon the municipality wishing to issue such bonds such terms, conditions, and covenants consistent with the provisions of the law authorizing the issuance of such bonds that it deems necessary to make the bonds creditworthy and thus protect the viability of the program. (History: 75-6-205, MCA; IMP, 75-6-212, 75-6-223, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.115 FINANCIAL AND OTHER REQUIREMENTS FOR LOANS TO PRIVATE PERSONS (1) It is anticipated that private persons or entities eligible for financing under the program may differ substantially in organizational structure, capitalization, creditworthiness, type and availability of security or collateral for the loan, and the numbers of users of the system. The department has determined it



is not feasible to establish by rule specific underwriting criteria applicable to each type of loan to a private party. In general, for a loan to a private person or entity, the department shall determine, based on representations of the borrower and other information available to it, that adequate revenues exist, or are reasonably expected to be produced, to pay the principal of and interest on the loan when due, and that the borrower will provide, or cause to be provided, to the department security or other collateral providing reasonable assurance of payment in the event of a default.

(2) The department is authorized to request and review any financial information of the borrower or third parties who may provide collateral or additional security that the department may deem necessary and appropriate to make the determination required under (1).

(3) The department may require such security or collateral for a loan to a private person or entity as it may determine necessary and appropriate in the circumstances, taking into account, among other things, the nature of the borrower, the principal amount of the loan and the project being financed, including, but not limited to:

- (a) a mortgage on the facilities being financed;
- (b) a mortgage on other property of the borrower or a third party;
- (c) an assignment of revenues or accounts receivable;
- (d) personal, corporate or other guarantees;
- (e) letters or lines of credit;
- (f) certificates of deposit; and
- (g) assignments or pledges of stock or other securities.

(4) The department may as a condition of the loan impose financial covenants on the borrower, including, for example, a limit on the ability of the borrower to incur additional indebtedness, and any covenants necessary to obtain, if feasible, or maintain the tax exempt status of the state bonds sold to finance the loan. (History: 75-6-205, MCA; IMP, 75-6-222, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

#### 36.23.116 COVENANTS REGARDING FACILITIES FINANCED BY LOANS

(1) Specific requirements and covenants with respect to the system or improvements to the system being financed from the proceeds of the loan must be contained in the bond resolution or loan agreement, forms of which are available from the department, and may include the requirements and covenants set forth herein.

The bond resolution or loan agreement should be consulted for more specific detail as to each of these covenants.

(2) The borrower must meet the requirements listed in the federal act for projects providing legal assurance that all necessary property titles, easements, and rights-of-way have been obtained to construct, operate, and maintain the project.

(3) The borrower must submit an engineering report complying with plan and specification requirements for public water systems

established by the board.

(4) The borrower must acquire:

(a) all property rights necessary for the project including rights-of-way and interest in land needed for the construction, operation, and maintenance of the facility;

(b) furnish title insurance, a title opinion, or other documents showing the ownership of the land, mortgages, encumbrances, or other lien defects; and

(c) obtain and record the releases, consents, or subordinations to the property rights for holders of outstanding liens or other instruments as necessary for the construction, operation, and maintenance of the project.

(5) The borrower shall agree to operate and maintain the project properly over its structural and material design life, which may not be less than the term of the loan.

(6) The borrower at all times shall acquire and maintain with respect to the system property and casualty insurance and liability insurance with financially sound and reputable insurers, or self-insurance as authorized by state law, against such risks and in such amounts, and with such deductible provisions, as are customary in the state in the case of entities of the same size and type as the borrower and similarly situated and shall carry and maintain, or cause to be carried and maintained, and pay or cause to be paid timely the premiums for all such insurance. All such insurance policies shall name the department as an additional insured. Each policy must provide that it cannot be canceled by the insurer without giving the borrower and the department 30 days prior written notice. The borrower shall give the department prompt notice of each insurance policy it obtains or maintains to comply with this rule and of each renewal, replacement, change in coverage or deductible under or amount of or cancellation of each such insurance policy and the amount and coverage and deductibles and carrier of each new or replacement policy. The notice shall specifically note any adverse change as being an adverse change.

(7) The department, the department of environmental quality, and the EPA and their designated agents have the right at all reasonable times during normal business hours and upon reasonable notice to enter into and upon the property of the borrower for the purpose of inspecting the system or any or all books and records of the borrower relating to the system.

(8) The borrower that is a municipality agrees that it will comply with the provisions of the Montana single audit act, Title 2, chapter 7, part 5, MCA, and to the extent not required by the single audit act to also provide for each fiscal year to the department and the department of environmental quality, promptly when available:

(a) the preliminary budget for the system, with items for the project shown separately; and

(b) when adopted, the final budget for the system, with items for the project shown separately.

(9) The borrower shall maintain proper and adequate books of record and accounts to be kept showing complete and correct entries of all receipts, disbursements, and other transactions relating to the system, the monthly gross revenues derived from its operation, and the segregation and application of the gross revenues in accordance with this resolution, in such reasonable detail as may be determined by the borrower in accordance with generally accepted governmental accounting practice and principles. It will maintain the books on the basis of the same fiscal year as that utilized by the borrower. The borrower shall, within 120 days after the close of each fiscal year, cause to be prepared and supply to the department a financial report with respect to the system for such fiscal year. The report must be prepared at the direction of the financial officer of the borrower in accordance with applicable generally accepted accounting principles and, in addition to whatever matters may be thought proper by the financial officer to be included therein, must include the following:

(a) a statement in detail of the income and expenditures of the system for the fiscal year, identifying capital expenditures and separating them from operating expenditures;

(b) a balance sheet as of the end of the fiscal year;

(c) the number of premises connected to the system at the end of the fiscal year;

(d) the amount on hand in each account of the fund at the end of the fiscal year; and

(e) a list of the insurance policies and fidelity bonds in force at the end of the fiscal year, setting out as to each the amount thereof, the risks covered thereby, the name of the insurer or surety and the expiration date of the policy or bond.

(10) The borrower shall covenant to take all necessary and legal action to collect such rates and charges, including terminating service, imposing reconnection fees and placing delinquent charges as a lien against the property and enforcing such lien to the extent permitted by law. The borrower must, if rates are regulated by the public service commission, notify the department of any proceedings before the public service commission regarding rates.

(11) The borrower shall also have prepared and supplied to the department and the department of environmental quality, within 120 days of the close of every other fiscal year, an audit report prepared by an independent certified public accountant or an agency of the state, if the borrower is a municipality, in accordance with generally accepted governmental accounting principles and practice with respect to the financial statements and records of the system. The audit report shall include an analysis of the borrower's compliance with the provisions of the bond resolution or loan agreement.

(12) The borrower shall agree to comply with all conditions and requirements of the federal act pertaining to the loan and the

project.

(13) The borrower shall agree not to sell, transfer, lease, or otherwise encumber the system, any portion of the system, or interest in the system without the prior written consent of the department while the bond resolution or loan agreement is in effect.

(14) The borrower shall agree to secure written approval from the department for any changes or modifications in the project before or during construction as set forth in the bond resolution or loan agreement. (History: 75-6-205, MCA; IMP, 75-6-224, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.117 FEES (1) The following fees and charges are established and imposed for participation in the revolving fund program.

(a) If an environmental impact statement is required pursuant to the Montana environmental policy act and the department or the department of environmental quality rules, the applicant shall bear the cost of the environmental impact statement.

(b) An administrative fee up to 1% of the amount of the committed amount of the loan must be charged each borrower. The department shall retain the administrative fee from the proceeds of the loan at the time of closing and transfer the fee to the state revolving fund administration account as provided in the indenture of trust. The department and department of environmental quality may determine, establish and revise from time to time, the precise amount of the administrative fee to be charged, based on the projected costs of administering the program and other revenues available to pay such costs.

(c) Each borrower shall be charged an administrative expense surcharge on its loan equal to .75% per annum on the outstanding principal amount of the loan, payable on the same dates that payment of principal and interest on the loan are due. The department and department of environmental quality may determine and establish from time to time, the precise amount of the administrative expense surcharge to be charged, based on the projected costs of administering the program and other revenues available to pay such costs. The administration expense surcharge must be deposited in the special administrative costs account as provided in the indenture of trust.

(d) Each borrower shall be charged an origination fee up to 1% of the amount of the commitment loan that must be charged to each borrower. Each borrower's origination fee shall be paid at closing by the retention by the department of such amount from the proceeds of the loans. The department and department of environmental quality may determine, establish and revise from time to time, the precise amount of the administrative fee to be charged, based on the projected costs of administering the program and other revenues available to pay such costs.

(e) All borrowers unless meeting the requirements of a disadvantaged municipality and awarded a subsidy by the department shall pay a loan loss reserve surcharge equal to 1% per annum on the outstanding principal amount of the loan, payable on the same dates that payments of principal and interest are paid. The loan loss surcharge must be deposited in the loan loss reserve account established in the indenture of trust until the loan loss reserve requirement as defined in the indenture is satisfied at which point it can be deposited in the state allocation account or to such other fund or account in the state treasury authorized by state law as a department of environmental quality or department representative shall designate, or segregated in a separate subaccount in the loan loss reserve account and applied to any costs of activities under the program authorized by state law as a department of environmental quality or department representative shall designate. The department and department of environmental quality may determine and establish from time to time, the precise amount of the loan loss reserve surcharge to be charged, based on the loan loss reserve requirement and the amounts in the match account. The borrower shall repay the following items: the loan at an interest rate determined in accordance with ARM 36.24.110, plus the loan loss reserve surcharge plus the administrative expense surcharge. The borrower shall propose rates and charges for all water services necessary to repay the above items. (History: 75-6-205, MCA; IMP, 75-6-224, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.118 EVALUATION OF FINANCIAL MATTERS AND COMMITMENT AGREEMENT

(1) Before the commitment agreement is executed, the department shall conduct a review of the applicant's financial status and determine based on the information available whether the borrower will be able to repay the loan. This review must include an analysis of all assets and liabilities as well as an analysis of the system's financial capability and may include but not be limited to: condition of the system, number of current and potential users, existing and proposed user fees for system, existing and proposed user fees for other utilities in the jurisdiction, overlapping indebtedness within the jurisdiction and any other financial or demographic condition relevant to the applicant's ability to repay the loan, or any additional security to be provided. If on the review of such material, the department determines that the loan cannot be repaid in accordance with its terms, the application must be denied.

(2) Upon approval of the a pplication, if the borrower is a municipality, the department may require the municipality, upon approval by its governing body, to enter into a commitment agreement in the form provided by the department with the department, pursuant to which the municipality agrees to adopt the bond resolution and issue the bond described therein, and to pay its origination fee in the event the municipality elects not to issue its bond.

(3) Upon approval of the application, if the borrower is a private person, the department may require the private person, upon approval by the appropriate person or entity, to enter into a commitment agreement in the form provided by the department with the department, pursuant to which the private person agrees to adopt the loan agreement and issue the bond described therein, and to pay its origination fee in the event the private person elects not to issue its bond. (History: 75-6-205, MCA; IMP, 75-6-224, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.119 REQUIREMENTS FOR DISBURSING OF LOAN (1) Loans will be disbursed by warrants drawn by the department of administration or wire transfers authorized by the state treasurer in accordance with the provisions of this rule, and the indenture of trust. No disbursement of any loan shall be made unless the department has received from the borrower, the following:

(a) a duly approved and executed bond resolution in a form acceptable to the department;

(b) a duly executed bond or promissory note in a principal amount equal to the amount of the loan in a form acceptable to the department;

(c) a certificate of the borrower that there is no litigation threatened or pending challenging the borrower's authority to undertake the project, to incur the loan, or issue the bonds, collect the system charges in a form acceptable to the department or to pledge its revenues or assets to the repayment of the loan or bonds;

(d) in the case of a borrower that is a municipality, an opinion of bond counsel acceptable to the department that the bond is a valid and binding obligation of the municipality payable in accordance with its terms and that the interest in a form acceptable to the department thereon is exempt from state and federal income taxation in a form acceptable to the department;

(e) in the case of a borrower who is a private person, an opinion of bond counsel to the department that the note and loan agreement are valid and binding obligations of the private party payable in accordance with its terms and that the making of the loan will not cause any bonds issued as tax-exempt bonds by the state to finance the program to become taxable;

(f) such other closing certificates or documents that the department or bond counsel may require to satisfy requirements of these rules;

(g) if all or part of a loan is being made to refinance a project or reimburse the borrower for the costs of a project paid prior to the closing, evidence satisfactory to the department and the bond counsel:

(i) that the acquisition or construction of the project was begun no earlier than March 7, 1985;

(ii) of the borrower's title to the project;

(iii) of the costs of such project and that such costs have been paid by the borrower; and

(iv) if such costs were paid in a previous fiscal year of the borrower, that the borrower intended at the time it incurred such costs to finance them with tax-exempt debt or a loan under a state revolving fund program such as the program.

(h) any certificate of insurance as evidencing insurance coverage as required by these rules and the bond resolution;

(i) a certified copy of the rate and charge ordinance, if applicable, and if subject to approval by another entity, evidence that such approval has been obtained;

(j) all permits or licenses that may be required by the state, any of its agencies and political subdivisions with respect to the project;

(k) executed copy of the construction contract accompanied by the appropriate performance and payment bonds;

(l) any additional documents required by the department or department of environmental quality as a condition to the approval of the loan described in the bond purchase agreement;

(m) a written order signed by a department of environmental quality representative authorizing a disbursement;

(n) a copy of the municipality's request for such disbursement on the form prescribed by the department; and

(o) payment of the origination fee. (History: 75-6-205, MCA; IMP, 75-6-224, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)

36.23.120 TERMS OF LOAN AND BONDS (1) The source of funding of the loans under this program initially will be 83.33% from the EPA and 16.67% from the proceeds of the state's bonds.

The interest rate on the loan will be determined by the department at the time the loan is made. The rate on a loan must be such that the interest payments thereon and on other loans funded from the proceeds of the state's bonds will be sufficient, if paid timely and in full, with other available funds in the revolving fund including investment income, from which the loan was funded to pay the principal of and interest on the state's bonds issued by the state.

(2) The rate of interest on loans from the program will vary in accordance with the rate on the state's bonds from which the loan is made. The rate of interest on all loans financed from the proceeds of a specific issue of bonds will be the same. The net interest cost on any loan may not exceed the net interest cost to the state on the state bonds from which such loan was made.

(3) Unless the department otherwise agrees, each loan shall be payable, including principal and interest thereon and the administrative expense surcharge and loan loss reserve surcharge, if any, over a term approved by the department, not to exceed 20 years. In no case shall the term of a loan exceed the useful life of the project being financed. Interest, administrative expense surcharge and loan loss reserve surcharge, if any, payments on each disbursement of each loan or portion thereof which is not a construction loan shall begin no later than 15 days prior to the

next interest payment date (unless the loan is closed within 15 days of the next interest payment date, in which case the first payment date shall be no later than 45 days prior to the next following interest payment date). For construction loans, the department may permit principal amortization to be delayed until as late as one year after completion of the project, provided that the payment of interest on each disbursement of a construction loan shall begin no later than 45 days prior to the next interest payment

date (unless the loan is closed within 15 days of the next interest payment date, in which case the first payment date shall be no later than 15 days prior to the next following interest payment date) unless the state has provided for the payment of interest on its bonds by capitalizing interest. In any event, the payment of interest must commence no later than the payment of principal.

(4) The department may also permit the borrower of a construction loan not to pay administrative expense surcharge and loan loss reserve surcharge, if any, on such construction loan until up to five months after the completion of construction of the project, but such administrative expense surcharge and loan loss reserve surcharge, if any, shall nonetheless accrue and shall be payable not later than the fifth month following completion of construction. Notwithstanding the previous sentence, the borrower shall pay all interest, administrative expense surcharge and loan loss reserve surcharge, if any, accrued on any construction loan disbursement no later than the twenty-fourth month after such disbursement is made and must thereafter make regular payments of interest, administrative expense surcharge and loan loss reserve surcharge, if any, on such disbursement. (History: 75-6-205, MCA; IMP, 75-6-224, MCA; NEW, 1998 MAR p. 1412, Eff. 5/29/98.)